

*a***JONG CHUK****v.****CHONG TUNG SANG & ORS;
BACOM ENTERPRISES SDN BHD (THIRD PARTY) (NO 4)***b***HIGH COURT SABAH AND SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: KG 104/94/11]
8 APRIL 1999***c****CIVIL PROCEDURE: Stay of proceedings - Stay of proceedings pending appeals - Principles - Discretion of court - Special circumstances - Rules of the High Court 1980, O. 47 r. 1 - Applicability****d*

This was an application by the 6th defendant/third party for stay of proceedings pending final disposal of 3 appeals to the Court of Appeal. The application was grounded upon the general contention that continuing the proceedings would prove nugatory and would cause irreparable prejudice to the applicant. The plaintiff and the other five defendants opposed the application and prayed that the same be dismissed with costs.

*e***Held:***f*

[1] An appeal does not operate as a stay of proceedings or execution. The court's power to stay proceedings may be exercised under particular summary provisions or under the Rules of the High Court or under the inherent jurisdiction of the court either separately or collectively. The applicant in the instant case had failed to specify under which of the above powers it was applying and this was fatal to the application.

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[2] The power to grant a stay is discretionary and the applicant must provide adequate evidence and material before the court can exercise its discretion. In the instant case, the applicant had failed to show either special circumstances or basis for irreparable prejudice to warrant invocation of the discretion to stay proceedings.

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[3] A final decision on the merits of the civil case had not been made and there was no pending execution of a final order at the instant date. That being so, O. 47 r. 1 Rules of the High Court 1980 was inapplicable. The applicant's allegation that continuing the proceedings would render its case nugatory was irrelevant and highly speculative.

[Application dismissed.]

Case(s) referred to:*i*

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 (*refd*)
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 73
Rules of the High Court 1980, O. 47 r. 1

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 37, paras 437, 439, 442

For the plaintiff - Wong Kim Fatt (Albert Tang with him); M/s Chew, Jugah, Wan Ullok & Co

For the 1st to 5th defendants - Fabian Lim; M/s Lim & Lim

For the 6th defendant & 3rd party - DP Naban (Malaka Nisau with him); M/s Sulong Matjeraie & Co

Reported by S Selvarajah

JUDGMENT

Muhammad Kamil Awang J:

This is the 6th defendant/third party (6D/TP) application for stay of all proceedings in respect of the action until the final disposal of the 3 appeals to the Court of Appeal in this action.

This plaintiff and 1st – 5th defendants opposed this application and prayed that it be dismissed with costs.

In the 6D/TP's Summons in Chambers dated 24 December 1998 (encl. 327) no ground for its application for stay was stated. The affidavit of David Goh of the same date in support of this application has not shown any special circumstances to invoke the discretion of the court to grant the stay sought. The court has not given any decision on the action proper and no execution of any order is pending. As such any allegation that the continuation of the proceedings pending the final disposal of the appeal may prove nugatory is irrelevant and highly speculative.

It may be noted that this power to grant a stay is discretionary and as such the applicant must provide adequate materials before the court for it to exercise its discretion.

In para. 4 of David Goh's affidavit, he alleged that –

Continuing with the proceedings presently before the disposal of the three appeals would prejudice *Bacom's* case irreparably particularly in view of the submissions made by the Plaintiff which are contrary to the arguments and submissions raised during the hearing of the Notice of Motion dated 4th August 1997.

In para 5, *ibid*,

Further in the event the proceedings are continued pending the disposal of the appeals referred to above, a decision in favour of *Bacom* in the appeals may

- a* result in substantial wastage of judicial time, costs and or may even prove nugatory.

On the issue of “irreparable prejudice” David Goh has not shown how there would be irreparable prejudice or the basis to say that it is a ground for stay of proceedings.

- b* David Goh’s allegation that continuing the proceedings “may” prove nugatory is irrelevant. A final decision on the merits of the civil suit proper has not been made, and there is also no pending execution of a final order as at the date hereof. It is purely speculative to say whether the 3 appeals would render the 6D/TP’s case nugatory.

- c* The trial has taken more than two years. The parties have closed their cases and filed their respective written submissions. Further delay would be caused by a stay of proceedings, and more importantly, it is not justifiable. David Goh’s allegation that “a decision in favour of Bacom in the appeals may result in substantial wastage of judicial time, costs and or may even prove nugatory”
- d* is baseless and speculative.

- There is nothing in David Goh’s affidavit to show special circumstances which are normally required to be shown when applying for a stay of execution of an order. See *Kerajaan Malaysia v. Dato’ Hj Ghani Gilong* [1995] 3 CLJ 161; [1995] 2 MLJ 119 (FC) and *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701; [1995] 2 MLJ 105 (FC).
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In *Halsbury’s Laws of England*, 4th edn, vol 37, para 437 provides:

- f* A stay of proceedings arises under an order of the court which puts a stop or “stay” or the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of the process. The order is made generally in the exercise of the court’s discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances.
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Further, para 439, *ibid*:

- h* In all cases, the grounds on which the application is made must be clearly specified, stating whether it is made under a particular statute or rule of court or the courts’s inherent jurisdiction or a combination of these.

- The court’s power to stay proceedings may be exercised under particular statutory provisions, or under the Rules of the High Court, or under the court’s inherent jurisdiction or under one or all of three powers. The applicant had
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failed to state under which particular statutory provisions, or under the Rules of the High Court, or under the court's inherent jurisdiction, or under one or all of the powers, it was applying. This failure could have made the application liable to be struck off. Order 47. r. 1 of the Rules of the High Court 1980 is obviously not applicable to the case. a

Section 73 of the Courts of Judicature Act 1964 provides: b

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the (Court of Appeal) so orders and no intermediate act or proceedings shall be invalidated except so far as the (Court of Appeal) may direct.

Rule 13 of the Rules of the Court of Appeal 1994 provides: c

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

The court's inherent power to order a stay of proceedings is succinctly summarised in para 442, *Halsbury's Laws of England*: d

The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue. e

The Application For Stay Not Bona Fide

The application for a stay should be made promptly, as soon as practicable after the grounds for making it have arisen or come to the knowledge of the applicant, otherwise it may be refused. f

After the close of the case for the 6D/TP, the court directed the parties to submit written submissions within a certain time-frame. The parties agreed, and there was no indication that the 6D/TP would make an application for a stay of proceedings pending the disposal of the 3 appeals. After the plaintiff and 1st – 5th defendant had submitted their written submissions, only then the 6D/TP made an application on 24 December 1998 for a stay of proceedings. The motive of the 6D/TP is apparent. It is to delay the proceedings. It is an abuse of the process of the court. g

In the circumstances, I would dismiss the application with costs to be taxed unless agreed and paid forthwith by the 6D/TP. h

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